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No. 88-1534

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

MERCY-MEMORIAL HOSPITAL CORPORATION, *et al.*,
Petitioners,

v.

HOSPITAL EMPLOYEES' DIVISION OF LOCAL 79,
SERVICE EMPLOYEES INTERNATIONAL UNION,
AFL-CIO, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Section 302 of the Labor Management Relations Act prohibits employers from giving "any money or other thing of value . . . to any employee . . . for the purpose of causing such employee . . . to influence other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing." *See* 29 U.S.C. § 186(a)(3). The questions presented are:

a. Whether the Sixth Circuit's decision that Section 302, an independent right created by Congress, is not preempted by Section 8 of the National Labor Relations Act is in conflict with any decision of other circuit courts of appeals;

b. Whether alleging that an employer has financed or otherwise assisted a decertification campaign states a claim under Section 302; and

c. Whether Section 302 is preempted by Section 8 of the National Labor Relations Act, which makes it an unfair labor practice for an employer to interfere with, restrain or coerce its employees in the exercise of their right to be represented and to bargain collectively.

II. Section 302 violations are predicate offenses which may be used to establish a pattern of racketeering under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, *et seq.* The questions presented are:

a. Whether alleging that an employer assisted two separate decertification petitioners in two separate and unconnected decertification campaigns sufficiently alleges a pattern of racketeering under RICO; and

b. Whether alleging that an employer committed two violations of Section 302 during the course of a single decertification campaign sufficiently alleges a pattern of racketeering under RICO.

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Procedural Posture

This is a labor case. It arises out of Petitioners' unsuccessful efforts to oust their employees' union, Respondent Hospital Employees' Division of Local 79, Service Employees International Union, AFL-CIO ("Union"), by the illegal means of subsidizing and assisting in two decertification campaigns. Respondent Union alleges violations of Section 302 of the Labor Management Relations

Act ("LMRA"), 29 U.S.C. § 186(a)(3), and of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961, *et seq.* (both acts are quoted in full in Appendix C to Petition at pp. 30a-41a). Respondent Union seeks injunctive relief under Section 302 and treble damages, costs and attorney's fees under RICO.

There has been no trial in this case. Discovery has not been completed and has been consistently resisted by Petitioners. Thus, many of the facts underlying Respondent Union's claims are still in the Petitioners' exclusive possession.

Respondent Union's Complaint was filed on December 4, 1986. On April 8, 1987 Petitioners filed a motion for summary judgment and a motion for accelerated judgment under Federal Rule of Civil Procedure 12(b)(6).

On December 11, 1987 the trial court granted, without hearing oral argument, Petitioners' motion for accelerated judgment, treating it as a motion to dismiss. The trial court ruled that it did not have jurisdiction over Respondent Union's Section 302 claim because that section was preempted by Section 8 of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158 (quoted *in toto* in Appendix C to Petition at pp. 20a-30a). *See* Opinion in Appendix B to Petition at pp. 10a-13a. The trial court further ruled that Respondent Union failed to state a claim under RICO because the predicate acts alleged in the complaint were committed during the course of a single scheme and thus did not evidence a "pattern" of racketeering. *See id.* at pp. 13a-16a.[1]

Respondent Union appealed. On December 6, 1988, the United States Court of Appeals for the Sixth Circuit reversed and remanded the case. *See* Opinion in Appen-

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[1] The Court also ruled that Respondents' claim for tortious interference with contractual relations was preempted by the NLRA. Respondents did not appeal that ruling.

dix A to Petition at p. 5a. On December 23, 1988 Petitioners moved to stay the Sixth Circuit's mandate. That motion was denied and on January 9, 1989 a mandate was issued.

Petitioners appealed to this Court on March 6, 1989.

Facts

The Union, an unincorporated association, is the certified exclusive collective bargaining representative of certain employees of Petitioner Mercy-Memorial Hospital Corporation ("Hospital"), a privately-owned hospital. *See* Complaint at paragraphs 3 and 19 ("C para. 3, 19") (quoted *in toto* in Appendix E to Petition). The Union represents, among others, individual Respondents Charlotte Baum, Ninfa Beckner and Stephen McHenry, all of whom are or were employed by the Hospital. (C para. 4-6).[2] Petitioner Richard Hiltz ("Hiltz") is the Hospital's administrator. (C para. 8).[3]

Since the Union was certified in 1970, the Hospital has vehemently resisted bargaining with the Union. The parties' history is one of constant litigation arising from the Hospital's recurrent and persistent unlawful refusal to bargain.[4]

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[2] Respondents will collectively be referred to as "Union."

[3] Petitioners will collectively be referred to as "Hospital."

[4] This saga began in May of 1972, when the Michigan Employment Relations Commission ("MERC") found the Hospital guilty of bargaining in bad faith and ordered it to bargain. (C para. 24). The Hospital refused. (C para. 24).

Endless litigation, through various forums, followed. *See, e.g., Monroe Mercy Hospital*, 1973 MERC Lab. Op. 336; *SEIU 79 v. Monroe Mercy Hospital*, 52 Mich. App. 165, 216 N.W.2d 589 (1974) *leave to appeal denied* 391 Mich. 839 (1974); *Mercy Memorial Hospital Corp.*, 220 NLRB 51, 92 L.R.R.M. 1378 (1976); *Mercy Memorial Hosp. Corp.*, 221 NLRB 1, 90 L.R.R.M. 1611 (1975); *NLRB v. Mercy Memorial*, 575 F.2d 1196 (6th Cir. 1978); *Mercy Memorial Hosp. Corp.*, 231 NLRB 1108, 96 L.R.R.M. 1239 (1977); *Mercy Memorial Hospital Corp.*, 282 NLRB No. 5 (1986). (C para. 43). In *every* forum, the hospital was found in violation of either state

In January of 1983, Hospital employee Nolan Smallwood filed a petition to decertify the Union. (C para. 34). The Hospital assisted him, financially or otherwise, in the pursuit of the decertification petition. (C para. 34). In March of 1983 the NLRB conducted a decertification election. (C para. 35). The Union won. (C para. 35).

In September of 1985, Hospital employee Susan Dorsey filed a second decertification petition. (C para. 37). The NLRB dismissed the petition because refusal to bargain charges were pending against the Hospital. (C para. 41, 42). Both the Hospital and Ms. Dorsey appealed the dismissal to the NLRB's General Counsel. (C para. 42).

Ms. Dorsey and the Hospital's appeal briefs were virtually identical. (C para. 42, 49). This prompted the Union to file a charge with the NLRB alleging that the Hospital had assisted a decertification petitioner in violation of Section 8(a)(1) the NLRA.[5] Exercising his prosecutorial discretion, the NLRB Regional Director refused to issue a complaint on the Union's charge. *See* Summary Report in Appendix D to Petition at pp. 43a-44a. This suit followed.

The Hospital has since persisted in its unlawful refusal to bargain with the Union and in its efforts to financially break the Union through endless litigation.

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and/or federal labor laws. Most recently, the Sixth Circuit agreed with the NLRB's decision that the Hospital had again failed to bargain in good faith and enforced the NLRB's order to bargain. *NLRB v. Mercy-Memorial Hospital Corp.*, 836 F.2d 1022 (6th Cir. 1988).

[5] Unknown to the Union at the time it filed its charge with the NLRB, the Hospital had also paid Ms. Dorsey $400 at the time she filed her decertification petition. Ms. Dorsey acknowledged this fact during her deposition. Her testimony specifically refutes the Hospital's claim that "testimony during discovery reveals nothing even remotely resembling bribery." Petition at p. 11.

ARGUMENT

I. SECTION 302

The trial court held that the Union's allegations under Section 302 of the LMRA "must be preempted by the jurisdiction of the NLRB." *See* Opinion in Appendix B to Petition at p. 13a. The Court of Appeals reversed, holding that

> Preemption is not a problem in the present case because section 302 is an independent liability-creating statute enacted by Congress to provide additional judicial remedies for certain wrongful conduct. . . . Both section 302 of the LMRA and section 8 of the NLRA may make similar conduct unlawful, but each provides an independent remedy. . . . Using *Garmon* preemption against section 302 actions would effectively repeal section 302 because the conduct proscribed by section 302 is almost always arguably subject to sections 7 or 8 of the NLRA and, therefore, subject to the jurisdiction of the NLRB in an unfair labor practice proceeding. The preemption doctrine has no application to this case because Congress intended two separate but complimentary remedies.

See Opinion in Appendix A to Petition at pp. 4a-5a (citations omitted).

A. Reasons For Denying The Writ

The Hospital claims that giving money and other assistance to its employees during a decertification campaign, although arguably an unfair labor practice, is not unlawful under Section 302 and therefore there exists no independent federal remedy to create an exception to the preemption doctrine. Petition at pp. 14-15. Section 302, the Hospital claims, is limited to cases of welfare fund abuse and to cases of bribery and extortion. *Id.* at p. 13. Hence, the Hospital reasons, the Sixth Circuit's decision to apply Section 302 to this case creates a "con-

flict among the circuits which demands resolution by this Court." *Id.* at p. 14.[6]

Yet, the Hospital does not cite a single appellate decision holding that Section 302 is preempted by the NLRA. There are none.[7] There is simply no conflict among the circuits on this issue justifying this Court's exercise of jurisdiction.[8]

Further, the issue upon which the Hospital focuses its petition—whether the Union stated a claim under Section 302—does not merit this Court's attention. Failure to state a claim is a relatively simple procedural question which is best decided at the trial level, where the complaint may be amended if necessary. Here, the trial court never reached the issue of whether the Union stated a claim under Section 302. *See* Opinion in Appendix B to Petition. The trial court dismissed the Section 302 claim solely on the preemption question. *Id.* The failure to state a claim issue is thus not even ripe for appellate review let alone Supreme Court review.

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[6] The Hospital also claims the Sixth Circuit's decision is in conflict with those of other circuits because, "[w]hile the majority of circuits limit the application of 302(e) to funds which have 'structural defects' as defined by the provisions of 302(e), some circuits also limit the available remedy to injunctive relief which is prospective in nature." Petition at p. 14. This alleged "conflict" has nothing at all to do with the decision below or with the legal issues involved in this case. This case does not involve a fund. This dispute does not involve the nature of the remedies available under Section 302. The Union seeks only injunctive relief as explicitly provided in Section 302(e). The Section 302 allegations support a claim of treble damages, attorney's fees and costs under RICO. However, no claim for damages is made under Section 302.

[7] The Hospital does not even cite a single case where one federal statute has preempted another federal statute.

[8] Indeed, the Union is aware of only two federal district court cases that address Section 302 and NLRA preemption. *See Butchers' Union Local No. 489 v. SDC Investment, Inc.*, 631 F. Supp. 1001 (E.D. Cal. 1986); *Local 355, Hotel, Motel Employees v. Pier 66 Co.*, 599 F. Supp. 761 (S.D. Fla. 1984).

There are no issues arising out of the Union's Section 302 claims which merit this Court's precious time and attention.

B. Respondents Have Stated A Claim Under Section 302

Section 302 prohibits:

> any employer . . . or any person . . . who acts in the interest of an employer . . . [from giving] . . . any money or other thing of value . . . to any employee . . . in excess of [his or her] normal compensation, for the purpose of causing such employee . . . to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing.

See 29 U.S.C. § 186(a)(3). The Union's complaint alleges that the Hospital and/or its agents paid money, rendered services or provided other valuable assistance to Nolan Smallwood and Susan Dorsey to further their efforts to decertify the Union and to cause Mr. Smallwood and Ms. Dorsey to influence other employees in favor of decertification. *See* C at paras. 34-37 and 45-51. These allegations squarely state a claim under Section 302.

Courts have recognized that Section 302 prohibits *all* payments from employers to employees and their representatives except those falling within the explicit exceptions carefully drafted by Congress. *See United States v. Ryan*, 350 U.S. 299, 305 (1956); *Bricklayers International Union v. Stuart Plastering Co.*, 512 F.2d 1017, 1024 (5th Cir. 1975). Yet, the Hospital argues that Section 302 is limited to cases of bribery and extortion. This self-serving interpretation is incorrect.[9]

In *Ironworkers v. Bechtel Power Corp.* the Sixth Circuit specifically found a violation of Section 302 where

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[9] Further, Ms. Dorsey's deposition testimony about the Hospital's $400 payment does provide some evidence of bribery.

there was no evidence of bribery or extortion. *See* 634 F.2d 258, 261 (6th Cir. 1981). It affirmed the trial court's finding that payments by an employer to a collectively-bargained industry steward fund violated Section 302(a). *Id.* It encouraged a "literal construction" of Section 302. *Id.*

Section 302 certainly prohibits bribery and extortion. However, its clear language also prohibits payments to employees and groups of employees for the purpose of causing them to influence other employees in the exercise of their right to be represented by a union. *See* 29 U.S.C. § 186(a)(3). The plain language of Section 302 covers the facts of this case where the Hospital has repeatedly financed or otherwise assisted some of its employees in their efforts to influence other employees to decertify the Union.

Moreover, it is inappropriate to contort legislative history and use policy declarations, like the Hospital does, to delete express provisions from congressional enactments. *See Colorado Interstate Gas Co. v. Federal Power Commission*, 324 U.S. 581, 596 (1945). Only where following the plain meaning of a statute would lead to a completely absurd result—one that would shock the general moral or common sense—are courts free to reject it. *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930).

Rejecting a statute's literal meaning is *so* close to usurpying the legislature's function that it should be done only in rare and exceptional circumstances and, even then, only with great caution and circumspection. *Id.* It should certainly not be done in this case because a literal reading of Section 302 does not produce a result that would shock the general moral and common sense.

To the contrary, forbidding employers from financing and otherwise assisting decertification efforts is consistent with the national labor policy of allowing employees to decide, without interference, whether to have union

representation. *See* 29 U.S.C. § 158(a)(1) ("[i]t shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 157"); *see also* 29 U.S.C. § 157 ("[e]mployees shall have the right to self-organization . . . through representatives of their own choosing . . . and shall also have the right to refrain from any or all such activities").

Because the Union has clearly stated a claim under Section 302, the Hospital's petition should be rejected.

C. The Court Of Appeals' Decision Concerning Preemption Is Clearly Correct: Section 302 Is Not Preempted By The NLRA

In its briefs below, the Hospital attempted to confuse the concepts of preemption and primary jurisdiction.[10]

The constitutional preemption doctrine precludes *state* regulation of substantive areas which Congress has decided are of substantial federal concern. *See San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 241-42 (1959) (preemption doctrine concerns "[t]he extent to which the variegated laws of the several states are displaced by a single, uniform, national rule"); *see also* U.S. Const. Art. VI cl. 2 (supremacy clause). This type of preemption is jurisdictional. *See International Longshoremen's Association v. Davis*, 476 U.S. 380, 390-91 (1986). If there is preemption under *Garmon*, then the

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[10] Even this Court has occasionally used the two terms interchangeably. *See Sears, Roebuck & Co. v. San Diego County District Council*, 436 U.S. 180, 199 n.29 (1978) (where the Court acknowledged that the opinion uses the term "primary jurisdiction" to refer to the federal preemption principles established in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 241-42 (1959)). The *Sears* Court distinguished *its* use of the term primary jurisdiction from the *doctrine* of "primary jurisdiction" which, the Court explained, concerns deferring to federal administrative agencies those decisions that concern statutes over which the agencies have primary enforcement responsibility. *Id.*

state's jurisdiction is completely extinguished. *See Miller v. Norfolk and Western Railway Co.*, 834 F.2d 556, 561 (6th Cir. 1987).

Primary jurisdiction, on the other hand, protects the authority of certain federal agencies to be the primary interpreters of congressional policy in the particular area of the law entrusted to them. *See Sears*, 436 U.S. at 199 n. 29; *see also Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 684-5 (1955); *American Commercial Barge Lines Co. v. Seafarers' International Union*, 730 F.2d 327, 337-39 (5th Cir. 1984); *Jackson v. Consolidated Rail Corp.*, 717 F.2d 1045, 1048 (6th Cir. 1983). Constitutional preemption precludes *state* interference into areas of particular federal concern; primary jurisdiction seeks to maintain consistency in policy *within the federal system.*[11]

Preemption renders a law completely inapplicable in the face of federal regulation. *See Garmon*, 359 U.S. at 241. If the preemption doctrine were applied as between federal statutes it would have the effect of repealing one in

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[11] For example, *Connell Construction Co. v. Plumbers and Steamfitters Local 100*, 421 U.S. 616 (1975), creates an exception to the doctrine of primary jurisdiction—not to the preemption doctrine. In *Connell*, the Supreme Court found preempted the application of *state* antitrust laws to a contract that was arguably protected by the National Labor Relations Act. 421 U.S. at 635-36.

On the other hand, the *Connell* Court found that the *federal* Sherman Antitrust Act *did* apply to the contract in question. *Id.* at 621-22. In deciding whether the contract was lawful under the Sherman Act, the Court held that it could examine the issue of whether the contract followed the requirements of Section 8(e) of the National Labor Relations Act, 29 U.S.C. § 158(e). *Id.* at 626. The Court found that the 8(e) issue was collateral to its determination under the Sherman Act and therefore examining it would not substantially interfere with the NLRB's primary jurisdiction. *Id.* The Court expressly rejected the argument that this determination of the 8(e) issue was within the NLRB's *exclusive* jurisdiction. *Id.* At no point did the Court find that the Sherman Act was preempted by the NLRA or vice versa.

favor of another, a result clearly disfavored by this Court. *See Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 468(1982) (repeals by implication are disfavored). Instead, Congress must be presumed to have carefully tailored and accommodated new legislation to existing legislation; the policies of seemingly overlapping statutes "necessarily must be accommodated, one to the other." *Burlington Truck Lines Inc. v. United States*, 371 U.S. 156, 172-73 (1962); *see also Butchers' Union Local No. 489 v. SDC Investment, Inc.*, 631 F. Supp. 1001, 1005-09 (E.D. Cal. 1986) (holding that parties may sue under RICO and Section 302 for conduct which is arguably an unfair labor practice).

As decided by the Sixth Circuit, Section 302 outlaws conduct which is also arguably prohibited by Section 8(a)(1) of the NLRA. Hence, to preempt Section 302 would be to repeal it by implication.

Section 302 was enacted in 1947, nearly 12 years after the enactment of the NLRA. *See* 29 U.S.C. §§ 151, 186(f). Congress enacted Section 302 with full knowledge of Section 8 and what it provided. Had Congress wanted to preserve the NLRB's exclusive jurisdiction over Section 8 violations, it would not have enacted Section 302. Instead, it explicitly granted federal courts jurisdiction to enjoin violations of Section 302. *See* 29 U.S.C. § 186(e); *see also Sellers v. O'Connell*, 701 F.2d 575, 577-78 (6th Cir. 1983) (Section 302 grants federal courts jurisdiction to enjoin violations of its provisions). Congress must have intended for Section 302 to be fairly accommodated to the NLRA.

The remedies provided by Section 8 and Section 302 are not inconsistent. The only civil remedy provided by Section 302 is, as stated before, the power to enjoin violations of its provisions. *See* 29 U.S.C. § 186(e). The NLRA, on the other hand, allows the Board to prosecute violations of Section 8 and to issue cease and desist orders

and award damages. *See* 29 U.S.C. § 160(c). These remedies are complimentary, not inconsistent.[12]

The Court of Appeals' decision in this case is not in conflict with decisions of other circuits, is clearly correct and raises no important issues of law which need to be settled by this Court. The Hospital's petition should be denied.

II. RICO

A. Reasons For Denying The Writ

It would be fundamentally unfair and a waste of valuable judicial resources for this Court to agree to decide a case where Petitioners have evaded and resisted discovery of the underlying facts and where the "facts" are therefore still mere allegations.

As stated before, there has been no trial in this case. Petitioners have continuously resisted discovery. Thus, most of the factual record underlying the Union's claims is still in Petitioners' exclusive possession. In fact, the Hospital's appeal from a magistrate's discovery decision and the Union's motion to compel discovery were both pending before the trial court when the complaint was dismissed. Accepting this case for review would unfairly reward Petitioners for their belligerence during discovery.

As a second matter, this case should not be accepted for review merely because another RICO case has been accepted for review. *H.J. Inc. v. Northwestern Bell Telephone Co.* involves issues which are different from those which arise here. *See* 829 F.2d 648 (8th Cir. 1987). In the *Bell* case, the Eighth Circuit engrafted two elements (relationship and continuity) to the RICO requirement that the complaint allege two predicate acts showing a pattern of racketeering. *See* 829 F.2d at 650, 651. On

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[12] Further, the NLRB has held that it lacks jurisdiction to enforce Section 302. *See B.A.S.F. Wyandotte Corp.*, 27 NLRB 978, 119 LRRM 1035 (1985).

the other hand, the Sixth Circuit in this case made a decision that the complaint alleged two "independent" wrongs which therefore "constitute[d] two separate predicate acts under RICO." Opinion in Appendix A to Petition at p. 5a. This conclusion was based on the complaint's allegations that the two predicate Section 302 violations were "separate in time" and committed upon two "individual employees [who were] different." *Id.* "Although [the two violations] may be part of a single purpose" "to get rid of a union", the Sixth Circuit reasoned, "they did not arise from a single set of facts constituting one transaction." *Id.* The Sixth Circuit found that "[a]s alleged they are separate offenses under Section 302 and must be held to constitute separate predicate offenses under RICO." *Id.*

Unlike the Eighth Circuit, the Sixth Circuit did not legislate any requirements into RICO. Instead, it based its decision on the factual allegations of the complaint.

The issue which the Hospital wants this Court to decide, whether two acts which are part of one scheme can give rise to a pattern of racketeering, was not decided by the Sixth Circuit. Indeed, that issue is not part of this case at all. The Sixth Circuit found that the complaint alleged *two* schemes. It did not hold that two schemes were *required.* It also did not speak to the issue of whether one scheme was sufficient. Its decision therefore does not conflict with either the majority or the minority views in this area.

Further, even if the Sixth Circuit's decision is interpreted as holding that the predicate acts required by RICO may be committed during the course of one scheme, that view is in the majority. On the other hand, the *Bell* decision is in the minority and constitutes the same kind of unlawful departure from RICO's express provisions as was struck down by this Court in *Sedima SPRL v. Imrex Co.*, 472 U.S. 479, 481 (1985).

Certiorari should be denied in this case because the record is incomplete due to Petitioners' resistance to discovery and because this case does not raise important legal questions which this Court must resolve.

B. The Court Of Appeals Correctly Found That The Complaint Alleges A Pattern Of Racketeering Under RICO

The Hospital urges this Court to, in effect, add an element to the RICO statute by requiring that the two foundation predicate acts that form a RICO "pattern of racketeering" be committed during the course of schemes with separate goals. The Hospital ignores the fact that *Sedima SPRL v. Imrex Co.* was a reaction to the lower courts' restrictive reading of RICO. *See* 473 U.S. at 481. It urges this Court to engage in the same sort of artificial narrowing specifically rejected in *Sedima.*

In *Sedima*, the Second Circuit added a conviction requirement not found in the RICO statute because it felt that such a narrowing was essential to avoid "intolerable practical consequences." *Id.* at 490. The Second Circuit also imposed the requirement of a special "racketeering injury" and sought to restrict application of RICO's admittedly harsh provisions to "mobsters." *Id.* at 494.

This Court rejected both of the Second Circuit's self-styled "improvements" upon RICO. *See Id.* at 485-86. Instead, this Court emphasized that RICO must be read broadly. *Id.* at 497-98. It also noted that opponents of RICO had previously complained in vain that RICO was "prone to abuse" and that it was "too easy a weapon [to use] against 'innocent businessmen'." 473 U.S. at 498.

The *Sedima* Court stressed that legitimate businesses "enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences." *Id.* at 499. It stated that the "fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." *Id.* (quoting *Haroco, Inc. v. American National Bank &*

Trust Co., 747 F.2d 384, 398 (7th Cir. 1984) *aff'd*, 473 U.S. 606 (1985)). It recognized that RICO actions were being brought almost solely against legitimate businessmen "rather than against the archetypal, intimidating, mobster" but found that "this defect—if defect it is—is inherent in the statute as written, and its correcion must lie with Congress," 473 U.S. at 499.

In this case, the Sixth Circuit followed the *Sedima* Court's suggestion that the "pattern" definition from the special offenders act be adopted by analogy. *See* Opinion in Appendix A of Petition at p. 5a; *see also* 473 U.S. at 496 n.14 (a pattern exists where the underlying criminal acts have the "same or similar purpose, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events"). It also heeded this Court's admonition that the essence of a RICO violation is the commission of "predicate acts sufficiently related to constitute a pattern." *See* Opinion in Appendix A of Petition at p. 5a; *see also* 473 U.S. at 497.

The Union's allegation of a pattern of racketeering meets the definition suggested in *Sedima's* footnote 14 and is composed of acts which are sufficiently related to constitute a pattern: Two predicate Section 302 violations are alleged. The Hospital's *purpose* in committing both violaitons was the same: to decertify the Union. The *victims* were the same: the Hospital's employees represented by the Union and the Union. The *methods* were the same: providing money, assistance and other things of value to decertification petitioners. Neither violation was an isolated event. Both were part of the Hospital's continuing unlawful course of conduct. Both are related. They are, however, separate and distinct schemes because they involve two separate and distinct decertification campaigns, separate in time and committed through separate individual employees.

The Hospital discounts the Union's allegations concerning Nolan Smallwood's decertification petition because they were plead upon "information and belief." Petition at pp. 4, 15-16, 17-18, 20, 23. The Hospital then concludes that the Union has plead only one predicate act and thus cannot establish a RICO violation. Again, the Hospital seeks to add an artificial pleading requirement to RICO.

The Federal Rules of Civil Procedure require the sort of fact-intensive notice pleading demanded by the Hospital only where *fraud* is alleged. *See* Fed. R. Civ. P. 9(b); *see also Seville Industrial Machinery Corp. v. Southmost Machinery Corp.*, 742 F.2d 786, 792 n. 7 (3rd Cir. 1984); *City of New York v. Balkan, Inc.*, 656 F. Supp. 536, 545-46 (E.D. N.Y. 1987); *Lewis v. Sporck*, 612 F. Supp. 1316, 1324 (N.D. Cal. 1985). Unlike the cases Petitioners cite, the Union does not rely on a fraudulent scheme to establish its RICO case. *Compare New England Data Services. Inc. v. Becher*, 829 F.2d 286 (1st Cir. 1987) (striking fraud allegations made upon information and belief). Thus, the Union's Section 302 allegations concerning Nolan Smallwood are properly plead upon information and belief and do establish a RICO pattern.

This case is not a stretch of RICO as are the mail and wire fraud cases upon which the Hospital relies. Nor is this case a creative or unanticipated use of RICO. Rather, this case is squarely based upon criminal violations which Congress explicitly identifies as RICO predicate acts. *See* 18 U.S.C. § 1961(1)(c). Thus, the pleading specificity required as a safeguard in fraud cases is not necessary here.

Further, when deciding a motion for judgment on the pleadings such as the Hospital's motion for "accelerated judgment," a court must take all allegations as true, construe them in the light most favorable to the nonmoving party and must draw all reasonable inferences in that

party's favor. *Cruz v. Beto*, 405 U.S. 319, 322 (1972); *see also Pheiffer v. Pennsylvania R.R. Co.*, 186 F.2d 558, 560 (6th Cir. 1951). A pleading should not be dismissed for failure to state a claim "unless it appears *beyond doubt* that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (emphasis added); *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). Under this test, the Sixth Circuit correctly held that the trial court had erred in dismissing the Union's complaint.

CONCLUSION

For the reasons above, the Hospital's petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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